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THE INS AND OUTS OF FILING A CLAIM UNDER THE FEDERAL TORT CLAIMS ACT

PHILIP SILVERMAN*

IN 1946, CONGRESS enacted the Federal Tort Claims Act (FTCA).[1] For the first time in our history, a judiciary remedy was available to compensate victims of the negligence or misconduct of government employees acting in the scope of their employment. The FTCA provided a one-year statute of limitations[2] and an optional administrative procedure.[3] In 1949 the FTCA was amended to extend the statute of limitations to two years,[4] and again in 1966 to require the administrative claim procedure.[5]

Prior to the 1966 amendment, the filing of an administrative claim was an option available to the claimant, but no claim in excess of $2,500 could be filed. Once a claim was filed, the claimant was barred from filing a suit until the government rejected the claim in writing or the claim was withdrawn from consideration on fifteen days' written notice. If the claim was withdrawn or rejected during the two-year limitation period, suit could be commenced up to the expiration of that period.[6] If the limitation period

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[1] Ch. 753, 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C.).

[2] Ch. 753, 60 Stat. 845 (1946).

[3] Ch. 753, 60 Stat. 843 (1946).

[4] 28 U.S.C. § 2401(b) (1976).

[5] 28 U.S.C. § 2672 (1976). The amendment became effective on January 18, 1967, the 20th anniversary of the effective date of the original act. Pub. L. No. 89-506 § 10, 80 Stat. 309 (1966).

[6] L. JAYSON, HANDLING FEDERAL TORT CLAIMS § 3.06 (Supp. 1979).

expired during the time the claim was under consideration, however, the claimant had six months from the time the agency mailed a notice of rejection or from the time of withdrawal. When suit was commenced, the *ad damnum* could not exceed the amount for which the administrative claim was filed.[7]

The Statute of Limitations

The 1966 amendments incorporated important changes into the claims procedure, which in turn substantially influenced the statute of limitations. Under the new procedures, the filing of an administrative claim became mandatory and a condition precedent to filing an action. Presently, it is the claim which is required to be filed within the two-year period previously available for the filing of actions.[8] The statutory period is not tolled by the minority of the claimant.[9] Once the agency rejects the claim, however, an action must be commenced within six months of the date of mailing the rejection, even though the six-month period ends prior to the expiration of the two-year limitation period for filing claims.[10]

In the event the government fails to act on the claim within six months, the claimant may, at his option, treat such failure to act as a final denial and commence an action any time thereafter.[11] Under such circumstances, the six-month limitation applicable when a claim is denied in writing does not apply, and in effect, an open-ended statute of limitations exists.[12] Should the agency, prior to commencement of any suit, forward such a denial letter, a six-month limitation period would commence from the date of such letter, no matter when sent.[13]

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[7] *Id.* at § 3.05.

[8] Kelley v. United States, 568 F.2d 259, 260 (2d Cir.), *cert. denied*, 99 S. Ct. 106 (1978); 28 U.S.C. § 2401(b); 28 U.S.C. § 2675(a).

[9] Smith v. United States, 588 F.2d 1209, 1211 (8th Cir. 1978); Pittman v. United States, 341 F.2d 739 (9th Cir.), *cert. denied*, 382 U.S. 941 (1965); Childers v. United States, 316 F. Supp. 539, 542 (S.D. Tex. 1970), *aff'd*, 442 F.2d 1299 (5th Cir.), *cert. denied*, 404 U.S. 857 (1971).

[10] Childers v. United States, 442 F.2d 1299 (5th Cir.), *cert. denied*, 404 U.S. 857 (1971); Claremont Aircraft Inc. v. United States, 420 F.2d 896 (9th Cir. 1969); Rodriguez v. United States, 382 F. Supp. 1 (D.P.R. 1974); 28 U.S.C. § 2401(b).

[11] Kelley v. United States, 568 F.2d 259, 260 (2d Cir.), *cert. denied*, 99 S. Ct. 106 (1978); 28 U.S.C. § 2675(a).

[12] Kelley v. United States, 568 F.2d 259, 260 (2d Cir.), *cert. denied*, 99 S. Ct. 106 (1978); 28 U.S.C. § 2675(a).

[13] 28 U.S.C. § 2401(b); 28 C.F.R. § 14.9 (1978).

The filing of an action[14] presupposes that a valid administrative claim has been timely presented to the interested agency in accordance with the regulations. The assertion of an appropriate administrative claim is jurisdictional and no principle of waiver or estoppel can operate against the government with respect to this jurisdictional prerequisite.[15] Nor does the government's failure to plead the statute of limitations, when an action is brought out of time, act as a waiver of the defense, since the time limitations set forth in the statute are jurisdictional and may not be waived.[16] Indeed, it may even be raised by a court sua sponte.[17] With the amendments to the FTCA, new regulations governing the procedures for filing administrative claims were promulgated[18] and amended but once.[19] These regulations govern the content and manner of filing such claims[20] and should be consulted before undertaking the filing of a claim against the United States.[21]

Presenting a Claim

When filing a claim, it is preferable to use the Standard Form 95, a government-issued form for administrative claims. The regulations provide, however, that claims may be presented by "other written notification," which can be a letter or even a tele-

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[14] A civil action is commenced by filing a complaint with the court. FED. R. CIV. P. 3.

[15] Powers v. United States, 390 F.2d 602 (9th Cir. 1968); Martin v. United States, 436 F. Supp. 535, 537-38 (S.D. Cal. 1977); Mayo v. United States, 407 F. Supp. 1352, 1354 (E.D. Va. 1976); Driggers v. United States, 309 F. Supp. 1377 (D.S.C. 1970).

[16] Perkins v. United States, 76 F.R.D. 593, 595 (W.D. Okla. 1976).

[17] Lien v. Beehner, 453 F. Supp. 604 (N.D.N.Y. 1978).

[18] 28 C.F.R. § 14 (1978).

[19] 35 Fed. Reg. 314 (1970); 28 C.F.R. §§ 14.2, 14.9.

[20] Regulations have the force and effect of law. Federal Corp. Ins. Co. v. Merrill, 332 U.S. 380 (1947); Caton v. United States, 495 F.2d 635 (9th Cir. 1974); Ianni v. United States, 457 F.2d 804 (6th Cir. 1972); Pringle v. United States, 419 F. Supp. 289, 291 (D.S.C. 1976). Section 14.2(a) has been held to be a valid regulation. Muldez v. United States, 326 F. Supp. 692 (E.D. Va. 1971).

[21] Some agencies have their own regulations governing the filing of administrative claims which should be consulted. In most cases however, they are virtually identical to the regulations issued by the Department of Justice, 28 C.F.R. § 14, which are discussed here. *See, e.g.*, Post Office, 39 C.F.R. § 912.1 -.15 (1978); Veterans Administration, 38 C.F.R. § 14.600-.608 (1978); Air Force, 32 C.F.R. § 842.100-.112 (1978); Navy, 32 C.F.R. § 750.30-.40 (1978).

gram.[22] The claim must be received within two years and must contain the appropriate information.[23]

The statute provides that a claim is barred unless it is presented in writing to the appropriate federal agency within two years.[24] The regulations also provide that a claim is deemed presented when "a Federal agency receives" the claim, and if a claim is directed to the wrong agency, "that agency shall transfer it forthwith to the appropriate agency."[25] Thus, in a case involving a midair collision which occurred on June 17, 1972, depositing a claim in a mailbox on June 17, 1974, addressed to the Federal Aviation Administration (FAA) office in Los Angeles, and to the United States Attorney for the Southern District of California (San Diego), was not considered the equivalent of receipt by a federal agency, or filing within the two-year period.[26] The court held that the post office was acting as agent for the plaintiff for transmission of the claim and not as an agency for the United States or the FAA for the purpose of receiving administrative claims: "Plaintiff has failed to demonstrate that . . . depositing an envelope in a mailbox is equivalent to receipt by a federal agency, much less 'presentment' within the meaning of the controlling statutes."[27] The court equated the word "presentment" in the statute, at a minimum, with the equivalent of filing.[28] The implication is clear, however, that if the claim is timely filed under the regulations, it is presented even when received by the wrong agency, which must then transfer it to the correct agency.[29]

The regulation requires only the completion of a Standard Form 95 or other written notification of the incident from the claimant or his duly authorized agent or legal representative, with a claim for a sum certain for the injury to or loss of property, personal injury or death.[30] The mere notice of an accident, however, is

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[22] 28 C.F.R. § 14.2(a) (1978).

[23] 28 U.S.C. § 2401(b) (1976); 28 C.F.R. § 14.2(a) (1978).

[24] 28 U.S.C. § 2401(b) (1976).

[25] 28 C.F.R. § 14.2(a) (1978).

[26] Steele v. United States, 390 F. Supp. 1109 (S.D. Cal. 1975).

[27] *Id.* at 1111.

[28] *Id.* at 1112.

[29] 28 C.F.R. § 14.2(a) (1978).

[30] *Id.*

insufficient to satisfy the administrative claim requirements,[31] and filing a lawsuit does not meet the requirements of presenting a claim.[32] Once the claim is filed the claimant "may be required" to submit additional information pertaining to the claim, in accordance with the regulations.[33] The failure to comply with such requests for this additional or supplemental information needed to process the claim can be considered a failure to file a proper claim, and result in dismissal of the subsequent action.[34]

Who May File

The most serious problems generated in the preparation of claims seem to involve the identity of the claimant, his duly authorized agent or legal representative, and the failure to state a sum certain. The regulations also define who may file an administrative claim.[35] For example, a claim for personal injuries may be presented by the claimant, his duly authorized agent, or his legal representative.[36] While it would seem a parent or guardian could act as agent for a minor or incompetent, since each is under a disability, the designation of a guardian by a minor or incompetent is subject to question, and whether the agency is "duly authorized" could be disputed.[37] The Ninth Circuit held, however, that parents may present claims on behalf of minor children if the names of the children are included in the claim.[38] Where no prejudice results to the government, courts have manifested a "judicial unwillingness" to permit the United States to stand on technicalities once a claim is filed, particularly when the rights of minors are involved and inequity would result.[39] In *Stokes v.*

[31] House v. Mine Safety Appliances Co., 573 F.2d 609, 615-16 (9th Cir.), *cert. denied sub nom.* Silver Dollar Mining Co. v. PVO Int'l Inc., ___ U.S. ___, 99 S. Ct. 182 (1978); Avril v. United States, 461 F.2d 1090 (9th Cir. 1972).

[32] Best Bearings Co. v. United States, 463 F.2d 1177, 1179 (7th Cir. 1972); Peterson v. United States, 428 F.2d 368 (8th Cir. 1970); Meeker v. United States, 435 F.2d 1219 (8th Cir. 1970).

[33] 28 C.F.R. § 14.4 (1978).

[34] Cummings v. United States, 449 F. Supp. 40 (D. Mont. 1978); Rothman v. United States, 434 F. Supp. 13, 17 (C.D. Cal. 1977).

[35] 28 C.F.R. § 14.3 (1978).

[36] *Id.* at § 14.3(b).

[37] House v. Mine Safety Appliances Co., 573 F.2d at 617-18.

[38] *Id.* at 618.

[39] Stokes v. United States, 444 F.2d 69 (4th Cir.), *cert. denied*, 404 U.S.

United States,[40] the court permitted a suit by a minor for injuries, notwithstanding the fact that the parents had settled their claim for the medical expenses incurred.[41] In *Locke v. United States*,[42] the husband of the deceased wife filed a claim seeking $250,000 for personal injury and failed to name his three minor daughters. The court rejected a motion to dismiss the claims of the minors, finding no prejudice to the government.[43]

Many problems have arisen with claims for wrongful death where the regulation provides that a claim may be presented by the executor or administrator of the decedent's estate, or "any person legally entitled to assert such a claim in accordance with applicable State law."[44] In a recent multiple death litigation stemming from a mine disaster in Idaho, the court held claims filed by a mother to be valid, since the parent has inherent authority to represent the interests of a minor child and since the parent of a minor child is a person legally entitled to assert a claim for wrongful death in accordance with Idaho law.[45] In *Pringle v. United States*[46] the claim was filed by the father for his minor son's estate, but he did not qualify as administrator until five days before the action was commenced. The court ruled that since he was not the executor or administrator at the time of filing the administrative claim, and South Carolina law required that a death action be brought in the name of an administrator or executor, the claim was a nullity.[47] Although the plaintiff contended that the case required a liberal reading and application of the law, and that he had complied with the spirit, if not the letter, of the law, the court rejected this argument, citing with approval from *Gunstream v. United States*,[48] "Congress in enacting the Federal Tort Claims Act

1002 (1971); Young v. United States, 372 F. Supp. 736 (D. Ga. 1974); Locke v. United States, 351 F. Supp. 185 (D. Hawaii 1972).

[40] 444 F.2d 69 (4th Cir. 1971).

[41] *Id.* at 70.

[42] Locke v. United States, 351 F. Supp. 185 (D. Hawaii 1972).

[43] *Id.* at 187.

[44] 28 C.F.R. § 14.3(c) (1978).

[45] House v. Mine Safety Appliances Co., 573 F.2d at 618; 28 C.F.R. § 14.3(c) (1978).

[46] 419 F. Supp. 289 (D.S.C. 1976).

[47] *Id.* at 291.

[48] 307 F. Supp. 366, 369 (C.D. Cal. 1969).

was impinging on the doctrine of sovereign immunity. The conditions put upon the exercise of the privilege created called for literal interpretation of the procedure for filing an administrative claim and the time limitations applicable thereto."[49]

In *Van Fossen v. United States*[50] the court distinguished between the bringing of a claim and the bringing of an action. The government insisted that the claim, filed by the California resident parents of a stewardess killed in the crash of a TWA jet near Dulles Airport in Virginia, was not asserted "in accordance with the applicable State law [of Virginia]," which provides for a death action to be brought by an administrator or executor as personal representative of the estate. The government's argument was viewed as suggesting "that the words 'bring an action' be used interchangeably with the words 'assert a claim' in regulation 14.3(c)."[51] The court, however, pointed out that the government had presented no authority to support that construction and stated, "A claimant who lacks the capacity to bring a wrongful death action in a state court may, nonetheless, be entitled to assert a claim in those courts for a part of the proceeds recovered. Such is the case in Virginia."[52] The court then emphasized that the Virginia Code provided that damages in death actions be distributed to the surviving spouse, children, and grandchildren, but if none survived, to parents, brothers, and sisters. Although the suit had to be brought by a representative, the representative was acting not for the general benefit of the estate, but rather as a trustee for certain surviving kin of the decedent, designated in the statute.[53]

The approach in *Van Fossen* appears to be sensible in light of the government's own regulation. Although it is provided that a personal injury claim may be presented on behalf of a claimant by a duly authorized agent or legal representative, a first reading of section 14.3(c) tells us that in a death action only a person "legally entitled to assert such claim in accordance with applicable state law" is entitled to present a claim. Section 14.3(e), however, specifically sets out the procedure for presenting a claim by "an

[49] Pringle v. United States, 419 F. Supp. 289, 292 (D.S.C. 1976).

[50] 430 F. Supp. 1017 (N.D. Cal. 1977).

[51] *Id.* at 1021.

[52] *Id.*

[53] *Id.*

agent or legal representative" and requires that the claim, when presented in the name of the claimant and signed by an agent or legal representative, must also show the title or legal capacity of the person signing, and should be accompanied by evidence of authority to present a claim on behalf of the claimant. The regulation then enumerates the various persons who may in fact sign the claim as "agent, executor, administrator, parent, guardian, *or other representative.*"[54] A fair reading of section 14.3(e) suggests that even in a death case, an agent, parent or guardian, or other representative, such as a next friend, as well as an executor or administrator, may be able to present the claim on behalf of the person legally entitled to assert the claim. Indeed it would seem that with proper authorization, even an attorney may sign and present a claim on behalf of an executor or administrator who may in fact be the legal claimant. This is supported by the decision in *House v. Mine Safety Appliances Co.*,[55] in which the circuit court remanded the case to determine whether the attorney, who had signed certain administrative claims, had authority to act as agent for the claimants.[56]

When one considers that the avowed purpose of the claims procedure is to spare the courts the burden of trying a case by affording the government an opportunity to consider settlement of a claim,[57] the issue, at least in *Pringle*, seemed narrowed to a question of technicalities.[58] Of what great importance was it that the father of the deceased minor child made the claim as a father, and not as administrator of the deceased child's estate, if the government was in fact notified of the purpose of the claim and the facts from which the claim arose? There was no claim of prejudice by the government in *Pringle*, and no indication that the government was prevented from properly considering the claim merely because the father filed as father and not as administrator. The court in *Van Fossen* noted the same issue, stating:

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[54] 28 C.F.R. § 14.3(e) (1978).

[55] 573 F.2d 609 (9th Cir. 1978).

[56] *Id.* at 617-18.

[57] House v. Mine Safety Appliances Co., 573 F.2d at 616-17 n.7; Robinson v. United States Navy, 342 F. Supp. 381 (E.D. Pa. 1972); [1966] U.S. CODE CONG. & AD. NEWS 2516.

[58] 419 F. Supp. 289, 290-91 (D.S.C. 1976).

> Likewise, in this case, the fact that plaintiffs' names and not that of a personal representative appeared on the face of the complaint in no way hindered the government's desire to settle the claim or its efforts to prepare a defense on the merits. In fact, were the government to pursue either course of action, one of the first steps that it would have to undertake would be to ascertain what survivors are entitled to claim under the Virginia statute. Furthermore, even if plaintiffs had procured a Virginia personal representative, under the Regulations, that representative would have had to present the claim in the name of the claimant. Thus the government can in no way contend that it was surprised or deceived in its pretrial deliberation. In short, the expediting function which Congress envisioned as the role of the administrative procedure was not impeded here.[59]

In some states wrongful death actions may be brought by the surviving spouse in his or her own behalf, and on behalf of minor children.[60] In these states an administrative claim filed on behalf of the decedent's estate by an executor or administrator may be considered a nullity, unless some authorization is shown to have been granted to the personal representative to file on behalf of the individuals entitled to recover.[61] Claims filed by the surviving spouse of a deceased minor which included claims by adult children were held to be invalid.[62]

It is clear then that the wrongful death act of a state must be carefully examined to determine what rights exist and to whom they belong. When an accident occurs which involves more than one jurisdiction, the choice of law principles of the state where the act or omission occurred must also be taken into consideration. To those who wonder why Virginia law appeared to govern the filing of a claim by Californians, it should be remembered that under the FTCA, the liability of the government is to be determined in accordance with the law of the place where the act or omission occurred,[63] which means the whole law of that state [the place where the act or omission occurred], including its con-

[59] Van Fossen v. United States, 430 F. Supp. 1017, 1023-24 (N.D. Cal. 1977). *See also* House v. Mine Safety Appliances Co., 573 F.2d at 609 n.8.

[60] *See, e.g.*, Maryland, Art. 3-904(d), 3-904(e); Md. R. P. Q40-Q44.

[61] House v. Mine Safety Appliances Co., 573 F.2d at 617-18; 28 C.F.R. § 14.3(e) (1978).

[62] House v. Mine Safety Appliances Co., 573 F.2d at 617-18.

[63] 28 U.S.C. § 1346(b) (1976).

flicts law.[64] This principle governs the meaning of the phrase "in accordance with applicable State law."[65] Thus in *Van Fossen*, the court in California was required to apply Virginia law since under that law, the law of the place of the accident governs.[66]

The question of who should file an administrative claim and the status of certain derivative claims are also important in considering who may file a claim. In some jurisdictions, the right to a derivative cause of action is separate and apart from the main claim.[67] Thus, a spouse's claim for loss of consortium, or a claim for medical expenses incurred by a parent on behalf of a minor child, or a spouse, may be personal to the claimant, though the claims may depend on the injured person's right to recover.[68] The incorrect assessment of everybody's rights may result in the barring of a valid claim.[69]

In *Heaton v. United States*,[70] the wife sued jointly with her husband for loss of services and consortium based on a claim signed only by her husband, seeking damages for his personal injuries. The court held that her cause of action was independent, separate, and distinct from the husband's personal injury claim. Since only the husband had signed the claim for his injuries, the court dismissed the wife's action, holding that the claim filed was not sufficient notice to apprise the government of the wife's claims for loss of services and consortium.[71] In *Green v. United States*[72] it was held that the mother's right to damages, though dependent on the daughter's right to recover, was personal to her and thus required a separate claim.[73] In *Santoni v. United States*[74] the husband failed to file an administrative claim for his loss of consortium.[75] This failure required a dismissal since Maryland law

[64] Richards v. United States, 369 U.S. 1 (1962).

[65] 28 C.F.R. § 14.3(c) (1978).

[66] Van Fossen v. United States, 430 F. Supp. 1017, 1020 (N.D. Cal. 1977).

[67] Heaton v. United States, 383 F. Supp. 589 (S.D.N.Y. 1974).

[68] Stokes v. United States, 444 F.2d 69, 70 (4th Cir. 1971).

[69] Heaton v. United States, 383 F. Supp. 589, 590-91 (S.D.N.Y. 1974).

[70] 383 F. Supp. 589 (S.D.N.Y. 1974).

[71] *Id.* at 590-91.

[72] 385 F. Supp. 641 (S.D. Cal. 1974).

[73] *Id.* at 642-43.

[74] 450 F. Supp. 608 (D. Md. 1978).

[75] *Id.* at 609-10.

provided that a claim for loss of consortium be instituted as a joint action by both husband and wife.[76]

A Sum Certain

Not the least of the problems arises from the requirement that the claim for money damages be in "a sum certain."[77] Inasmuch as the filing of a proper administrative claim is an absolute prerequisite to the maintenance of a suit in the district court,[78] the court lacks subject matter jurisdiction if a claim is filed which fails to state a sum certain.[79] Thus, even where the amount stated in the claim was for a sum "in excess of $50,000.00," the case was dismissed for failure to comply with the regulations.[80] In *College v. United States*,[81] a claim was filed more than two years after the accident in the sum of $172,495.52. Although a letter from plaintiff's counsel to the Air Force, written within the two-year period, had notified the Air Force of the accident and injuries, it made no mention of a sum certain. Noting that the FTCA and Air Force regulations required the statement of a sum certain, the court affirmed the dismissal, stating in part: "However, we believe the regulation requiring that a claim be stated as a sum certain is neither inconsistent with the statute nor unreasonable, . . . and as a valid expression of when a claim is considered to have been presented is binding on the appellant."[82] Thus failure to include the amount claimed is a failure to comply with the regulation and will result in dismissal.[83] Where a claimant, instead of stating a sum certain, inserted the phrase "unknown at this time," the court held there was a failure to comply with the regulations and hence the

[76] *Id.* at 610.

[77] 28 U.S.C. § 2675(a) (1976); 28 C.F.R. § 14.2(a) (1978).

[78] Three-M Enterprises, Inc. v. United States, 548 F.2d 293 (10th Cir. 1977); Executive Jet Aviation, Inc. v. United States, 507 F.2d 508 (6th Cir. 1974); Best Bearings Co. v. United States, 463 F.2d 1177 (7th Cir. 1972).

[79] Raymond v. United States, 445 F. Supp. 740 (E.D. Mich. 1978).

[80] *Id.*

[81] 572 F.2d 453 (4th Cir. 1978).

[82] *Id.* at 454 (citations omitted).

[83] Allen v. United States, 517 F.2d 1328 (6th Cir. 1975); Melo v. United States, 505 F.2d 1026 (8th Cir. 1974); Avril v. United States, 461 F.2d 1090 9th Cir. 1972); Bialowas v. United States, 443 F.2d 1047 (3d Cir. 1971); Fallon v. United States, 405 F. Supp. 1320 (D. Mont. 1976).

[84] Caton v. United States, 495 F.2d 635 (9th Cir. 1974).

action did not meet the jurisdictional requirements of 28 U.S.C. 2676(a).[84]

In *Allen v. United States*[85] the claim was specific as to the property damage claimed, but did not state a sum for the personal injuries. The action, however, was brought only for the personal injuries and loss of consortium. It was held it did not qualify as a claim.[86] In *Robinson v. United States Navy*[87] the court dismissed an action in which the plaintiff had filed a claim, specifically stating a property damage claim in the sum of $2,135.45 "plus personal injury."[88] In *Fallon v. United States*[89] the claim filed requested "approximately $15,000." The court was unwilling to dismiss on this technicality, stating:

> Administrative claims should be so interpreted to prevent technical and unjust results if such an interpretation can be applied without thwarting the purpose which the regulation seeks to serve. Where a claim filed with a federal agency contains definite figures rendered uncertain by the use of qualifying words, there seems to be no valid reason why the agencies and the courts cannot treat the additional words as surplusage, leaving the certain amounts stated as the claim. If a rule of interpretation requires the elimination of the surplusage, and I hold that it does, then the claim here, so interpreted, is certain.[90]

The court, relying on language in *Caton v. United States*,[91] went on to eliminate the word "approximately" so that the claim stated a sum certain of $15,000. The action also had the effect of limiting the recovery.

This result, however, conflicted with the earlier *Robinson* decision.[92] If the rule in *Fallon* had been followed in the *Robinson* case, the court would have recognized at least the claim for $2,135.45 property damage. Interestingly, the court in *Fallon* certified the issue for appeal as a controlling question of law,[93] but

[85] 517 F.2d 1328 (6th Cir. 1975).

[86] *Id.* at 1329-30.

[87] 342 F. Supp. 381 (E.D. Pa. 1972).

[88] *Id.* at 383-84.

[89] 405 F. Supp. 1320 (D. Mont. 1976).

[90] *Id.* at 1322.

[91] 495 F.2d at 637-38.

[92] Robinson v. United States Navy, 342 F. Supp. 381 (E.D. Pa. 1972).

[93] 28 U.S.C. § 1292(b) (1976).

there is no record of an interlocutory appeal having been taken by the government.

No Class Action Claims

The twin requirements of authorization and a sum certain also preclude the filing of class action administrative claims. As pointed out earlier, claims must be filed by the claimant or his authorized agents or representatives.[94] In a class action, very often the class is undefined and unknown, thus the identity of claimants and the specific damage suffered by each cannot be measured. Further, each claimant is required to make his claim in a "sum certain."[95] A claim which merely states a final sum sought on behalf of a class, however, does not state a sum certain for each of the unknown members of the class. In *Blain v. United States*,[96] a claim was filed by one party [the Prestons] on their own behalf and "other parties," alleging damage to property sustained by the Prestons and "other parties in class action."[97] The claim was denied as to all parties as a class including the Prestons.[98] Citing the absence of individual claims by the owner of the property damaged, or an authorized agent or legal representative, the court ruled that no valid claim had been filed, and the jurisdictional requirement had not been met.[99] This principle has also been applied to family claims,[100] and can be expected to preclude attempts at class actions in multiple aviation accident litigation.[101]

Amending a Claim

The regulation also provides that claims may be amended prior

[94] 28 C.F.R. § 14.3 (1978).

[95] 28 C.F.R. § 14.2 (1978).

[96] 552 F.2d 289 (9th Cir. 1977).

[97] *Id.* at 290.

[98] *Id.* The Prestons later instituted and settled their individual claim, but were not parties to the pending action.

[99] *Id.* at 291; *see also* Lunsford v. United States, 570 F.2d 221 (8th Cir. 1977).

[100] House v. Mine Safety Appliances Co., 573 F.2d at 617; *see also* note 13 *supra.*

[101] *See* McDonnell Douglas Corp. v. United States Dist. Court, 523 F.2d 1083 (9th Cir. 1975), *cert. denied,* 425 U.S. 911 (1976); Pan American World Airways, Inc. v. United States Dist. Court, 523 F.2d 1073 (9th Cir. 1975); Marchesi v. Eastern Air Lines, Inc., 68 F.R.D. 500 (E.D.N.Y. 1975); Causey v Pan American World Airways, Inc., 66 F.R.D. 392 (E.D. Va. 1975); Hobbs v. Northeast Airlines, Inc., 50 F.R.D. 76 (E.D. Pa. 1970).

to any final agency action or prior to the exercise of the claimant's option to sue under 28 U.S.C. 2675(a).[102] The regulation provides that "[a] claim presented in compliance with paragraph (a) of this section may be amended," and suggests that only valid claims may be amended even after the two-year period for filing expires. It is possible, however, that before the two-year limitation passes, and before any agency action is taken, a claimant (or his attorney) may discover that the claim is defective or a nullity because it lacks a critical ingredient. Since a claim treated as a nullity would be insufficient to support jurisdiction, it is feasible that another (not an amended) claim could be filed as long as the two year period had not expired. It also seems feasible that an otherwise incomplete (invalid) claim could be amended, or at least made complete, by providing supplementary information to be incorporated with the invalid claim, if the supplementary information, when incorporated, completes the claim in compliance with the regulation within the two years. Such incorporation by reference, though not found, was recognized recently in *House v. Mine Safety Appliances Co.*,[103] a multiple disaster mine case in which the court stated, "Unless the incorporation of the Notice of Claim is effective, these claims are clearly incomplete."[104]

Reconsideration

Once a claim has been denied, a request for reconsideration of the claim may be made.[105] The request must be made within the original six-month period after denial and before any action is started.[106] When properly made, it will toll the original six-month limitation period, until the government denies the request for reconsideration and then another six-month period begins from the date of the second denial letter.[107] This procedure, however, can only be used once.[108]

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[102] 28 C.F.R. § 14.2(b) (1978).

[103] 573 F.2d 609 (9th Cir.), *cert. denied sub nom.* Silver Dollar Mining Co. v. PVO Int'l Inc., ___ U.S. ___, 99 S. Ct. 182 (1978).

[104] *Id.* at 615.

[105] 28 C.F.R. § 14.9(b) (1978).

[106] *Id.*

[107] *Id.*

[108] *Id.*

The Ad Damnum

Once a proper claim containing a sum certain has been filed, the amount sought in the administrative claim is generally the maximum for which suit may be brought, unless the increased amount is based upon newly discovered evidence which was not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts.[109] In *Molinar v. United States*[110] a claim letter dated October 19, 1971, was submitted in connection with an auto accident which occurred March 2, 1970, without stating any amount, but had attached medical bills in the sum of $1,462.50. In February, 1972, the FAA sent four Form 95's (Claim for Damage or Injury), requesting they be completed and returned. This was done on May 4, 1972. On July 20, 1972, the FAA denied the claim and suit was commenced on November 16, 1972. The plaintiff was awarded $20,000. On appeal, the court held that enclosing medical bills for a specific amount, *i.e.*, $1,462.50, was a claim for a "sum certain" and that three knee operations performed on the plaintiff were intervening facts justifying the award in excess of the "sum certain" claimed.[111]

In another case, however, a plaintiff sought to amend his *ad damnum* from the $250,000 sought in the claim to $500,000. Although the court allowed the amendment, it ruled plaintiff would not be allowed to recover more than the sum stated in the claim unless newly discovered evidence of intervening facts could be shown at trial.[112] In *Kielwien v. United States*[113] plaintiff filed a claim in the sum of $25,000, and the court below, finding there were intervening facts, awarded the sum of $123,578.90. The circuit court found that the extent and permanency of plaintiff's injuries were not based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the government.[114] The court distinguished this case from *United States v.*

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[109] 28 U.S.C. § 2675(b) (1976).

[110] 515 F.2d 246 (5th Cir. 1975).

[111] *Id.* at 249-50.

[112] Colin v. United States, 324 F. Supp. 121 (W.D. Mo. 1970).

[113] 540 F.2d 676 (4th Cir.), *cert. denied*, 429 U.S. 979 (1976).

[114] *Id.* at 681.

Alexander,[115] in which plaintiff filed a claim only six weeks after the injury. In *Kielwien*, the plaintiff had filed the claim almost a year after the injury. After comparing the facts with other cases in which intervening facts were recognized, the court quoted approvingly from *Nichols v. United States*:[116]

> The statute, 28 U.S.C. §2675(b), would be meaningless if claimants, after rejection of their claim, could institute actions for amounts in excess of the claim filed merely because they, or their attorneys, are of the opinion that the claim has a greater value and that is about the extent of the proof of an 'intervening fact, relating to the amount of the claim' in this case.[117]

The case was remanded to enter a judgment in accordance with the amount claimed in the administrative claim.[118] It appears that each case in which attempts are made to sue for amounts in excess of the sum claimed will be looked at separately to determine if there are intervening facts or if there is newly discovered evidence not reasonably discoverable at the time the claim is presented to the government. The burden of establishing such newly discovered evidence or intervening facts rests on the claimant-plaintiff.[119]

Time for Filing

As stated earlier, once the agency has denied or rejected the claim, suit must be brought within six months of the date on the denial letter.[120] If suits are brought after six months, they will be dismissed as being barred by the statute of limitations.[121] One may not file a lawsuit and hold it in abeyance until a claim is filed or until the six months have gone by, for the court has no jurisdiction over the action unless the conditions precedent, *i.e.*, filing a proper claim, and the passage of six months, have been met.[122] Thus, if

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[115] 238 F.2d 314 (5th Cir. 1956).

[116] 147 F. Supp. 6 (E.D. Va. 1957).

[117] Kielwien v. United States, 540 F.2d 676, 681 (4th Cir.), *cert. denied*, 429 U.S. 979 (1976).

[118] *Id.* at 680-81.

[119] *Id.* at 680; Smith v. United States, 239 F. Supp. 152, 154 (D. Md. 1965).

[120] 28 U.S.C. § 2401(b) (1978).

[121] Childers v. United States, 442 F.2d 1299 (5th Cir.), *cert. denied*, 404 U.S. 857 (1971); Claremont Aircraft Inc. v. United States, 420 F.2d 896 (9th Cir. 1969); Rodriguez v. United States, 382 F. Supp. 1 (D.P.R. 1974).

[122] Best Bearings Co. v. United States, 463 F.2d 1177 (7th Cir. 1972); Marano v. United States Naval Hosp., 437 F.2d 1009, 1011 (3d Cir. 1971); Walley

a lawsuit is filed prior to filing an administrative claim, it will be subject to a motion to dismiss; however, where there is sufficient time, the suit can and should be discontinued without prejudice to bringing the lawsuit after the statutory conditions precedent have been met.[123]

Third Party Claims

Quite often, particularly in an aviation case, the plaintiff sues an airline or manufacturer, who in turn files a third party complaint against the United States. No administrative claim is required in order to implead the United States as a third party defendant, or to file counterclaims or crossclaims.[124] Merely because the government has been impleaded by a co-tortfeasor does not permit the plaintiff, *ipso facto*, to file an action against the government without having filed an administrative claim and allowing six months to elapse. Although the United States may be in the lawsuit, and discovery may ensue among all the parties, in order to maintain an affirmative action against the United States, the same jurisdictional requirements discussed above must be met. The rationale is that the provisions of section 2675(a) give the court jurisdiction only over a third party claim, counterclaim or crossclaim, but do not excuse the claim procedure where there is a direct claim against the government.[125]

Other Administrative Claims

Claimants seeking damages against the United States under the Federal Tort Claims Act are required to show that the damages claimed occurred as a result of the negligence or wrongful conduct of a government employee or agent acting in the scope of his em-

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v. United States, 366 F. Supp. 268 (E.D. Pa. 1973); Driggers v. United States, 309 F. Supp. 1377 (D.S.C. 1970); Gutelius v. United States, 312 F. Supp. 51 (E.D. Va. 1970); Deavers v. United States, 291 F. Supp. 856 (S.D. Tex. 1968). These requirements cannot be waived.

[123] *See* Raymond v. United States, 445 F. Supp. 740 (E.D. Mich. 1978).

[124] 28 U.S.C. § 2675(a) (1978). Such an action may not be "instituted" upon a claim against the United States which has been presented to a federal agency unless the agency has made final disposition of the claim.

[125] West v. United States, 592 F.2d 487, 490-91 (8th Cir. 1979); *see also*, Rosario v. American Export-Isbrandtsen Lines, Inc., 531 F.2d 1227, 1230-34 (3d Cir.), *cert. denied*, 429 U.S. 857 (1976).

ployment.[126] Some of the government's liability resulting from military activities, however, has been seriously limited by the exceptions to jurisdiction under the FTCA[127] and decisions such as *Feres v. United States*[128] which prevent servicemen from suing when the injury or damage arises incident to the claimant's military service. In other situations, negligence or misconduct may not have played any part in causing the injury or damage. Examples are a sudden and undetectable failure of an aircraft electrical system resulting in the pilot's ejection and a crash causing injuries or damages on the ground, or the unexplained explosion of an ammunition dump.[129]

To cover such contingencies the Congress enacted the Military Claims Act,[130] whereby claims not to exceed $25,000 may be settled and paid[131] by the Secretary of the service. There is no limitation, however, on the amount which may be claimed, and if the Secretary finds a claim in excess of $25,000 has merit, he may pay the $25,000 within his authority and report and recommend to Congress payment of the excess.[132] There is no appeal, however, from the Secretary's determination. Each of the services has promulgated regulations to be followed in submitting claims of this type. Though the differences in the regulations among the services are more procedural than substantive, they should be consulted in each instance to assure compliance with the particular service requirements, including choice of the proper claimant.[133]

In addition to the Military Claims Act, Congress has enacted the Foreign Claims Act,[134] and a National Guard Claims Act.[135]

[126] 28 U.S.C. § 1346(b) (1976); 28 U.S.C. § 2671 (1965).

[127] 28 U.S.C. § 2680 (1976).

[128] 340 U.S. 135 (1950).

[129] JAYSON, *supra* note 6, at § 4.02.

[130] 10 U.S.C. § 2733, which covers domestic and foreign non-combat and non-service related activities, unless covered by Foreign Claims Act.

[131] Initially the settlement limit was $5,000; in 1970 it was increased to $15,000 and in 1974 it was raised to $25,000. 10 U.S.C. § 2733(a) (1976).

[132] 10 U.S.C. § 2733(d) (1976).

[133] For Air Force regulations see 32 C.F.R. §§ 842.0 *et seq.*, 842.40 *et seq.* (1978); for Army regulations see 32 C.F.R. §§ 536.1 *et seq.*, 536.12 *et seq.* (1978); for Navy (and Marine) regulations see 32 C.F.R. § 750.1 *et seq.*, 750.50 *et seq.* (1978).

[134] 10 U.S.C. § 2734, covers non-combat activities in foreign countries but is limited to inhabitants of foreign countries. Regulations are found at 32 C.F.R. § 842.50 *et seq.* (1978).

[135] 32 U.S.C. § 715 (1976).

Though the Coast Guard in peacetime is part of the Department of Transportation,[136] in times of war, or whenever the President may direct, it operates as an arm of the Navy. Recent amendments to the Military Claims Act permit coverage of claims arising out of the non-combat activities of the Coast Guard as well as activities of other Defense Department employees.[137]

Claims under any of the foregoing acts must be presented within two years of the occurrence. In general, the Standard Form 95 can be used, and should be supplemented at the time of filing by as much supportive information as possible. The claims section of the military service, made up of officers from the Judge Advocate General Staff, will review the documents submitted. The amount claimed, whether for injury or death, will be measured against the judgments and verdicts rendered in the claimant's or decedent's jurisdiction. As an example, let me cite a claim I submitted on behalf of the parents of an honorably discharged Marine, separated because of a disability, who was permitted free travel privileges on MATS aircraft. During a summer recess, the former Marine, then a college junior, was killed while traveling in Europe on a C-141 Starlifter, when the aircraft crashed in Spain. Though pilot negligence seemed apparent, no action was possible because it arose in a foreign country.[138] Thus a claim was filed under the Military Claims Act. The decedent and his family lived in California, and decedent had been attending school in California. Supportive information included birth and death certificates, school honor certificates, a copy of decedent's honorable discharge, service citations, promotions and certificates, commendations from teachers and professors, current grades, letters from employers, statement of his current health, sympathy letters, and news articles. Also included was a life table and the latest verdict and judgment values (as available) pertaining to a like situation.

The settlement of such a claim, however, as a practical matter, is based on the decision of the claimant to accept what is offered. There are no lawsuits or appeals to be filed from the determination of the Secretary, although unless otherwise barred, the filing of a

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[136] 49 U.S.C. § 1655 (1976).

[137] 10 U.S.C. § 2733 (1976).

[138] 28 U.S.C. § 2680(k) (1976).

claim under the Military Claims Act would not preclude a later suit under the Federal Tort Claims Act.[139] It should be noted, however, that presenting claims under the Military Claims Act will not toll the statute of limitations for Federal Tort Claims Act purposes.[140]

Summary

It has long been settled that the United States, as a sovereign, is immune from suit except as it consents to be sued, and the terms of such consent define the court's jurisdiction to entertain the action.[141] The procedures established under the FTCA are strictly construed.[142] Thus the filing of a valid administrative claim is an absolute prerequisite to maintaining a civil action against the government for damage arising from a tortious occurrence due to the negligence of a federal employee,[143] and if a plaintiff fails to allege that he satisfied the requirements established under the FTCA, the complaint must be dismissed.[144] A claimant may not commence a court action, however, until the agency has either denied the claim within the six-month period or a six-month period has elapsed since the claim was filed and no action has been taken.[145] By careful adherence to the statutes and regulations, no attorney should have any major difficulty establishing the jurisdictional prerequisites to an action under the Federal Tort Claims Act.

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[139] *See* Gaidys v. United States, 194 F.2d 762, 763-64 (10th Cir. 1952).

[140] For a comprehensive discussion of the Military Claims Act, and similar claims acts see JAYSON *supra* note 6, at §§ 4.01-4.09; for claims under International Agreements, 10 U.S.C. § 2734(a) and § 2734(b), *see* JAYSON, *supra* note 6, at §§ 5.01-5.03.

[141] Honda v. Clark, 386 U.S. 484, 501 (1967); United States v. Sherwood, 312 U.S. 584, 586 (1941); Bialowas v. United States, 443 F.2d 1047, 1048-49 (3d Cir. 1971).

[142] Three-M Enterprises, Inc. v. United States, 548 F.2d 293 (10th Cir. 1977); Pennsylvania v. National Ass'n of Flood Insurers, 520 F.2d 11, 20 (3d Cir. 1975).

[143] Best Bearings Co. v. United States, 463 F.2d 1177 (7th Cir. 1972).

[144] Lann v. Hill, 436 F. Supp. 463, 466 (W.D. Okla. 1977). *But see* Altman v. Connally, 456 F.2d 1114, 1116 (2d Cir. 1972) (dismissal within discretion of trial court).

[145] Caton v. United States, 495 F.2d 635, 638 (9th Cir. 1974).